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No. 97-1229

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

NEW YORK LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. a. The conflict among the circuits over the proper characterization of a tax remittance as a deposit or a payment is a pervasive one that requires resolution by the Court. In the Fifth and Federal Circuits, any remittance made by a taxpayer before the tax has been assessed—even a remittance expressly styled as a "payment" of tax—is considered to constitute a "deposit" rather than a "payment" of tax "as a matter of law" (Pet. App. 15a). See *Thomas* v. *Mercantile National Bank*, 204 F. 2d 943 (5th Cir. 1953); *Ford* v. *United States*, 618 F.2d 357 (5th Cir. 1980). These circuits refuse to give any consideration

to whether the facts and circumstances show that a "payment" rather than a "deposit" was in fact intended and in fact made by the taxpayer. By contrast, three other circuits have expressly rejected the conclusion of these courts that "there can be no payment of tax before the IRS makes a formal assessment of the * * * tax liability" (*Zeier* v. *United States*, 80 F.3d 1360, 1364 (9th Cir. 1996)). See *Moran* v. *United States*, 63 F.3d 663, 666 (7th Cir. 1995); *Ewing* v. *United States*, 914 F.2d 499, 503 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991). These courts have instead concluded that, in determining whether a "payment" or a "deposit" was made, courts are to look to the "facts and circumstances" surrounding the actual conduct of the parties. See, *e.g.*, *Ewing* v. *United States*, 914 F.2d at 503 (the facts and circumstances test "is the better reasoned [analysis] and represents the clear weight of authority"). Under the facts and circumstances test, the taxpayer in this case would plainly have been held to have made a "payment" rather than a "deposit." See Pet. 18.

Respondent is wrong in asserting that this direct and acknowledged conflict among the circuits can be resolved by looking solely to whether the "tax is contested" by the taxpayer at the time of the remittance (Br. in Opp. 11). In *Moran* v. *United States*, 63 F.3d at 669, the court specifically rejected the contention "that the decision to dispute a liability necessarily signifies an intent not to make a payment on that liability." The court noted in *Moran* that Section 7422(b) of the Internal Revenue Code provides that a refund suit may be brought "whether or not such tax * * * has been paid under protest" (26 U.S.C. 7422(b)). Whether a "protest" was made with

the remittance is therefore irrelevant in a tax controversy. 63 F.3d at 669. The court correctly concluded in *Moran* that neither the lack of valid assessment nor the taxpayers' "decision to dispute a liability" transforms a remittance designated as a "payment" into a "deposit." *Ibid.* In reaching that decision the Seventh Circuit specifically "disagree[d]" with the contrary rule adopted by the Federal Circuit in *Cohen* v. *United States*, 995 F.2d 205 (1993), on which the Federal Circuit relied in the present case (Pet. App. 13a ("Cohen controls this case.")).

Respondent is thus simply wrong in contending that, when "the tax is contested, the courts * * * uniformly treat the remittance as a deposit in the absence of assessment" (Br. in Opp. 11). To the contrary, the courts of appeals have forthrightly acknowledged that they are in conflict on this issue and that no fewer than "three approaches" have been applied in distinguishing between "payments" and "deposits" (*Fortugno* v. *Commissioner*, 353 F.2d 429 (3d Cir. 1965), cert. dismissed, 385 U.S. 954 (1966)). As the Seventh Circuit emphasized in *Moran*, during the fifty years that have passed since the Court's decision in *Rosenman* v. *United States*, 323 U.S. 658 (1945), "[l]ower courts have * * * debated what rule *Rosenman* established or implied." 63 F.3d at 667. "The circuit courts have divided in their application of *Rosenman*" and have adopted disparate tests that lead to disparate results. *Ewing* v. *United States*, 914 F.2d at 503. Resolution of this longstanding conflict among the courts of appeals is needed to ensure consistent treatment of taxpayers and to avoid wasteful and recurring litigation.

b. Respondent is incorrect in asserting that this "controversy exists only because the IRS made a simple mistake—it failed to assess a disputed tax within the statute of limitations on assessment" (Br. in Opp. 19). As we explain in the petition (Pet. 17), the obligation to pay a tax exists without regard to whether an "assessment" of the tax has been made. See 26 U.S.C. 6151(a) ("when a return of tax is required * * * , the person required to make such a return shall, *without assessment* or notice and demand from the Secretary, pay such tax") (emphasis added)). An assessment is "more or less a bookkeeping procedure that permits the government to bring its administrative apparatus to bear in collecting a tax * * * but it is neither the beginning nor the end of tax liability." *Moran* v. *United States*, 63 F.3d at 666. When, as in the present case, the government has already collected the $31 million in disputed tax and interest, there is no need for any further collection action to be taken and therefore no need for any assessment to be made. See *ibid.* The courts below erred in attaching any importance—much more in attaching a *dispositive* importance—to the absence of an assessment for a tax that has already been paid.

Moreover, under the Internal Revenue Code, there is no such thing as a tax "deposit." The IRS has adopted a Revenue Procedure that establishes specific terms under which the agency will treat remittances from taxpayers as a "deposit." Rev. Proc. 84-58, 1984-2 C.B. 501. Unless that Procedure is followed, any remittance made to the IRS in connection with a proposed deficiency is deemed a "payment" of tax. *Ibid.* In this case, respondent specified in its transmittal letter that it desired its

remittance to be treated as a "payment"—and not as a "deposit"—under the Revenue Procedure (Pet. App. 28a-29a). As the petition explains at length (Pet. 10-19), in holding that this express "payment" of tax should instead be treated as a "deposit," the decision in this case misinterprets the decision of this Court in *Rosenman* v. *United States*, *supra*, and conflicts directly with the decisions of several other circuits.

2. For the further reasons detailed in the petition (Pet. 19-27), the court of appeals erred in concluding that the Tucker Act provides jurisdiction over this case. Respondent offers no genuine explanation for the court's extraordinary expansion of the jurisdiction provided by that statute. Instead, respondent protests that it would have had no remedy if the court had not assumed jurisdiction in this case (Pet. 23-24). But the remedy that Congress has long provided to persons such as respondent—who pay a tax and thereafter desire to obtain their money back—is available to respondent. That remedy is the suit permitted by 26 U.S.C. 7422. That statute permits a taxpayer suit to recover "any * * * tax alleged to have been erroneously or illegally assessed or collected" or "any sum alleged to have been excessive or in any manner wrongfully collected" (26 U.S.C. 7422(a)). Congress provided jurisdiction for this statutory suit for recovering such a "tax" or "sum" under the express provisions of 28 U.S.C. 1346(a) and *not* under the Tucker Act. See Pet. 19-26. Indeed, respondent has already taken the initial step required for pursuing such an action—by filing a timely refund claim—and remains free to pursue that remedy. See Pet. 6 n.5.

The Tucker Act does not provide taxpayers with yet another avenue for obtaining relief from a tax

obligation that they contend is erroneous. That, however, is precisely the conclusion that the court below adopted—a conclusion that wholly bypasses the detailed rules that Congress provided for the recovery of a "tax" or "sum" "in any manner wrongfully collected" under the internal revenue laws (28 U.S.C. 1346(a)(1)). Under the detailed rules that Congess provided for such suits, respondent was not entitled to recover the "tax" or "sum" that it tendered in this case because that amount did not exceed what was owed at the time that the payment was made. See *Lewis* v. *Reynolds*, 284 U.S. 281, 283 (1932); Pet. 12, 24. Because Congress has provided "in great detail the protections and remedies applicable to such action," the court of appeals erred by resorting to alternative non-statutory theories of relief under the Tucker Act. See *United States* v. *Fausto*, 484 U.S. 439, 443 (1988).*

The non-statutory remedy erected by the court of appeals in this case sews broad confusion for the most routine aspects of tax administration. Neither taxpayers nor the United States can now know with certainty where and how tax controversies will be determined.

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* In its response to the petition, respondent does not even address this Court's decision in the *Fausto* case.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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